RECENT DECISIONS.

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BANKRUPTCY—NATIONAL BANKRUPTCY ACT—CONFLICT WITH STATE INSOLVENCY LAWS.—A statute of California provided methods for distributing the assets of insolvent corporations, and in addition provided certain regulative measures for winding up solvent concerns. *Held,* although those features of the State law which are in their nature insolvency laws are *ipso facto* suspended by the National Bankruptcy Act, yet those provisions of the statute which merely regulate domestic corporations are effective. *Continental Building & Loan Association* v. *Superior Court* (Cal. 1912) 126 Pac. 476. See Notes, p. 64.

BANKRUPTCY—PARTNERSHIP—FIRM AS PARTNER—MARSHALLING OF ASSETS.—A partnership united with an individual to form a larger firm, which became bankrupt. The small partnership was also insolvent. Creditors of the large firm claimed they should share *pro rata* in the distribution of assets of the small firm. *Held,* the members of the latter had a prior right to its assets. *In re Knowlton & Co.* (D. C. E. D. Pa. 1912) 196 Fed. 837.

The doctrine of equity that creditors of a partner have priority as to his separate assets, while the funds of the firm shall be primarily devoted to its own creditors, although subject to much criticism as illogical and empirical, see Burdick, Partnership, 283, 286, has been crystallized in § 5-*f* of the Bankruptcy Act and is applied invariably where the partnership is composed of natural members. *In re Telfer* (1910) 184 Fed. 224. As partnerships have been adjudged capable not only of uniting with individuals to form larger firms without losing their individuality, irrespective of internal changes they may undergo, *Raymond* v. *Putnam* (1862) 44 N. H. 160; see *Gulick* v. *Gulick* (1835) 14 N. J. L. 578, but of being administered in bankruptcy on this basis, *In re Assignment of Gilbert* (1896) 94 Wis. 108; *Bullock* v. *Hubbard* (1863) 23 Cal. 496; see *In re Hamilton* (1880) 1 Fed. 800, the language of § 5-*f* would seem to embrace a firm as partner, especially since the Bankruptcy Act regards a partnership as an entity. *In re Bertenshaw* (1907) 157 Fed. 363; 8 COLUMBIA LAW REVIEW 391. It would follow that the creditors of the small partnership in the principal case were properly preferred in the distribution of its assets. But should its position as a partner in the large firm be held to destroy the integrity of the small firm, then *a fortiori* would the decision be sound, for the creditors of the small firm would then be creditors of the individual members of the large firm, and the very terms of § 5-*f* would give them priority over creditors whose rights were primarily against the conjoint partnership. *In re Telfer supra.*

BANKRUPTCY—SURETY'S CLAIM FOR INDEMNITY.—A surety, who had paid the obligee after the principal's discharge in bankruptcy, sued the principal upon his written contract of indemnity. The obligee had proved his claim in bankruptcy, but there had been no dividend. *Held,* the surety could recover. *R. P. Williams & Co.* v. *United States Fidelity & Guaranty Co.* (Ga. 1912) 75 S. E. 1067.

A surety who has not discharged his principal's obligation before the latter's petition in bankruptcy plainly has no cause of action for indemnity at that time, and therefore cannot prove his claim against the assets. *Phillips* v. *Dreher Co.* (1902) 112 Fed. 404; *cf. In re Gebhard* (1905) 140 Fed. 571; see 8 COLUMBIA LAW REVIEW 305; but see *In re O'Donnell* (1904) 131 Fed. 150. By § 57-*i* of the Bankruptcy Act, U. S. Comp. Stat. (1901) 3418, 3443, however, a surety may prove the obligee's claim for him, or may become subrogated to it upon payment. Thus the surety can secure for the obligee whatever dividend he may be entitled to, and therefore, by reducing his own liability, can enjoy all the advantages of a provable claim. If he becomes subrogated to the obligee's claim by payment, the courts recognize, particularly when any question of preference arises, that § 57-*i* gives him rights only under the obligee's claim, and not under his own. *Livingstone* v. *Heineman* (1903) 120 Fed. 786; *Swarts* v. *Siegel* (1902) 117 Fed. 13. Since § 57-*i* does not render the surety 's own claim provable, see *Insley* v. *Garside* (1903) 121 Fed. 699, and since the acquisition of an additional right by subrogation can hardly be held to void the valid written contract of indemnity, it would appear that the indemnity claim was in no way affected by the discharge, and that the surety may recover upon it. But this view gives the surety a double protection, as if he had both a provable and an unprovable claim, and it is doubtful if such an exceptional result was intended to be effected by § 57-*i*. see *Smith* v. *Wheeler* (N. Y. 1900) 55 App. Div. 170; *Hayer* v. *Comstock* (1901) 115 Ia. 187; *cf. Goding* v. *Roscenthal* (1901) 180 Mass. 43.

CHATTEL MORTGAGES—AGISTER'S LIEN—PRIORITY.—The plaintiff held a chattel mortgage on two horses, which, subsequently to the filing of the mortgage, had been entrusted to defendant by the mortgagor for agistment. In an action of replevin the defendant set up his agister's lien. *Held,* the plaintiff was entitled to the horses. *Rohrer* v. *Ross* (Colo. 1912) 125 Pac. 489.

As an agister had no lien at common law, *Jackson* v. *Cummins* (1839) 5 M. & W. 342, a statute creating one should be strictly construed so as to exclude the idea that the legislature intended to give the lien priority over all existing encumbrances. *Hanch* v. *Ripley* (1890) 127 Ind. 151; *Bank* v. *Scott* (1898) 7 N. D. 312. Nevertheless, when animals subject to a recorded chattel mortgage are, without the knowledge of the mortgagee, left with an agister by the mortgagor, the cases are in conflict as to the rights of the parties. On the one hand it is held that, as agistment is incidental to the preservation of the property, the mortgagee's consent to the agister's statutory lien is to be implied. *Case* v. *Allen* (1878) 21 Kan. 217; *Alymore* v. *Kahn* (1896) 11 Oh. C. C. 392. But by the sounder view there can be no such inference from the mere fact that the mortgagor is left in possession, 1 Jones, Liens, (2nd ed.) § 691 *et seq; Howes* v. *Newcomb* (1888) 146 Mass. 76; *Wright* v. *Sherman* (1892) 3 S. D. 290, as this is the usual form of the transaction and the mortgagee cannot by implication be held to have assented to the impairment of his security, the reasonable assumption being that the mortgagor himself would care for the animals. *Ingalls* v. *Vance* (1889) 61 Vt. 582. Moreover, the record of the mortgage is constructive notice of the prior encumbrance to the agister and should, therefore, prevent his acquisition of rights against the mortgagee, *McGhee* v. *Edwards* (1889) 87 Tenn. 506;

Chapman v. *Bank* (1892) 98 Ala. 528, but not affect the assertion of the lien against the mortgagor. The principal case adopts this view, which is supported by the weight of authority.

CHATTEL MORTGAGES—RECORD AS NOTICE—DEFECTIVE EXECUTION.—A chattel mortgage, defectively executed in that one of the subscribing witnesses was a member of the mortgagee partnership, was filed. *Held,* the record was notice to subsequent purchasers from the mortgagor, since the defect did not appear upon the face of the mortgage. *Berkner et al.* v. *D'Evelyn et al.* (Minn. 1912) 137 N. W. 1097.

When a defect in the execution of a chattel mortgage appears upon its face, the filing of the mortgage will not constitute notice to purchasers, upon the ground that the recording clerk has no right to accept for record an instrument plainly not complying with the statute, as where the acknowledgment is not accompanied by a required certificate, *Tweto* v. *Horton* (1903) 90 Minn. 451, or where the mortgagee himself witnesses or takes acknowledgment of the mortgage. *Donovan* v. *Elevator Co.* (1899) 8 N. D. 585; see *Stevens* v. *Hampton* (1870) 46 Mo. 404. But when, for example, the acknowledgment is taken by a stockholder in a mortgagee corporation, *Boswell* v. *Bank* (1907) 16 Wyo. 161, or by the owner of one of the notes secured by the mortgage, *Meckel Bros. Co.* v. *De Witt* (1901) 23 Oh. C. C. 174, it is the duty of the clerk, since he can see no defect, to file the instrument, and the majority of cases hold that the record is notice, for the reason that any other rule would destroy the reliability of the public records. See *Titus* v. *Johnson* (1878) 50 Tex. 224. There is a contrary opinion, however, which proceeds upon the ground that it would encourage fraud to permit an interested party, in any case, to witness the mortgage or take the acknowledgment without destroying its validity as notice. *Wilson* v. *Traer & Co.* (1866) 20 Ia. 231; *Kothe* v. *Krag-Reynolds Co.* (1898) 20 Ind. App. 293. This view is suported by the fact that the recording acts are statutory, and should be strictly construed against the mortgagee, for whose benefit they have been enacted. *First Nat. Bank* v. *Hacoda Co.* (1910) 169 Ala. 476. In the principal case the name of the disqualified witness appeared in the partnership name of the mortgagee; but in *Wilson* v. *Traer Co. supra* and *Kothe* v. *Krag-Reynolds Co. supra* this was not regarded as making the defect apparent.

CONFLICT OF LAWS—MASTER AND SERVANT—SERVANT'S ACTION FOR NEGLIGENCE.—The plaintiff, working on the defendant's ship, under a contract of employment made in Germany, was injured by his master's negligence in the port of New York. *Held,* the Workmen's Compensation Law of Germany should be enforced. *Schweitzer* v. *Hamburg American Line* (1912) 48 N. Y. L. J. No. 57.

As a general rule, a tort action is governed by the law of the place where the injury occurred, rather than by the law of the forum. 2 Wharton, Confl. of Laws, (3rd ed.) § 478-*b*. When, however, the tort committed constitutes also a breach of a contract which was made elsewhere, it has been held that the *lex loci contractus* prevails, on the ground that the parties presumably contracted with reference to it, *Dyke* v. *Erie R. R. Co.* (1871) 45 N. Y. 113; *Dupont* v. *Quebec S. S. Co.* (Can. 1896) L. R. 11 Que. S. C. 188, and that the contract itself gives rise to the tort liability. Burdick, Torts, (2nd ed.) 8. If the express terms of the contract must be relied upon undoubtedly this rule should be applied, even though the form of the action be in tort. 2

Wharton, Confl. of Laws, (3rd ed.) § 478-*b*. When, however, the action is for breach of an obligation imposed by law because of the relation between the parties rather than for breach of the contract which established such relation, the existence of the contract should not prevent the *lex loci delicti* from governing. *Kans. City Ry. Co.* v. *Becker* (1899) 67 Ark. 1; *Nashville etc. Ry. Co.* v. *Eakin* (Tenn. 1869) 6 Coldw. 582. Since the injured servant may elect to sue in assumpsit this view always ensures statutory recovery when a workmen's compensation act has been adopted either by the *lex loci contractus* or the *lex loci delicti*. *Rick* v. *Saginaw B. T. Co.* (1903) 132 Mich. 237; *Ala. etc. Ry. Co.* v. *Carroll* (1892) 97 Ala. 126; *Pensabene* v. *Auditore Co.* (1912) 48 N. Y. L. J. No. 67.

CONSTITUTIONAL LAW—ADMISSION OF STATES—RESTRICTION IN ENABLING ACT.—The defendant was indicted for a breach of a Federal statute based upon a provision in the New Mexico enabling act forbidding the introduction of liquors into Indian country, which term, it was provided, should include all lands owned or occupied by the Pueblo Indians. *Held,* the defendant's demurrer should be sustained, as the restriction in the enabling act was ineffective. *United States* v. *Sandoval* (D. C. N. M. 1912) 198 Fed. 539.

The United States, though free to exclude a territory from statehood, may not admit it subject to any restriction, else the powers of the Federal government would cease to be enumerated by the Constitution alone, and the Union would become one of unequal States. *Pollard's Lessee* v. *Hagan* (1845) 44 U. S. 212; *Coyle* v. *Oklahoma* (1911) 221 U. S. 559; 10 COLUMBIA LAW REVIEW 591. These results, it seems, can only be avoided by holding invalid any stipulation in an enabling act which would not be effectual if the subject of Congressional legislation after the State's admission. *Coyle* v. *Oklahoma supra,* 573. An apparent exception arises in the reservation of jurisdiction over the Indian tribes, but this is valid upon the theory that the United States is the guardian of the Indians and the trustee of their lands. 10 COLUMBIA LAW REVIEW *supra,* 596; *see The Kansas Indians* (1866) 5 Wall. 737. But since the Pueblos are citizens and freeholders, *United States* v. *Joseph* (1876) 94 U. S. 614, the question of the right of Congress to deprive a State of part of its police power as a condition of admission was squarely presented, and the court necessarily denied such a right, even though the State had acquiesced.

CONSTITUTIONAL LAW—TAXATION—SPECIAL ASSESSMENTS.—A city was authorized by statute to improve its boardwalk at the expense of abutting owners in proportion to the frontage of their property. *Held,* such assessments did not constitute a taking of property without due process of law. *Bassett* v. *Mayor & City Council of Ocean City* (Md. 1912) 84 Atl. 262.

The right of the legislature to create special taxing districts to bear the expense of public improvements therein, *States* v. *Fuller* (1870) 34 N. J. L. 227; *Webster* v. *Fargo* (1901) 181 U. S. 394, is usually put on the ground that those within the districts are specially benefited. *English* v. *Wilmington* (Del. 1895) 2 Marv. 63. This has led to the view in some jurisdictions that the cost of street improvements can be assessed upon abutting property only to the extent of special benefits conferred. *Adams* v. *Shelbyville* (1900) 154 Ind. 467; *Chamberlain* v. *Cleveland* (1878) 34 Oh. St. 551. By the weight of authority, however, the declaration by the legislature that such property is deemed

to have been specially benefited is conclusive, 4 Dillon, Munic. Corp., (5th ed.) § 1431 *et seq; White* v. *People* (1880) 94 Ill. 604, and its determination of the mode of assessment is not subject to review by the courts, *French* v. *Barber Asphalt Paving Co.* (1901) 181 U. S. 324; *People* v. *Pitt* (1902) 169 N. Y. 521, unless it is clearly and manifestly unfair. *Norwood* v. *Baker* (1898) 172 U. S. 269. Although occasional hardship may result, *Seattle* v. *Kelleher* (1904) 195 U. S. 351, the foot front rule provides an equitable as well as an effective method of measuring the benefits conferred; *Baltimore* v. *Johns Hopkins Hospital* (1880) 56 Md. 1; 2 Cooley, Taxation, (3rd ed.) 1218; and there are no circumstances in the principal case such as are present in rural and agricultural districts, *Re Washington Ave.* (1871) 69 Pa. 352, which would justify the court in declaring the assessment unfair as furnishing no possible standard of benefits received.

CONSTITUTIONAL LAW—VETO POWER—TIME LIMIT FOR RETURN OF BILL.—The New Jersey constitution provides that a bill shall become a law if the Governor does not return it, with his objections, to the House where it originated within five days, "unless the legislature by their adjournment prevent its return, in which case it shall not be a law." A bill was presented to the Governor and on the same day the House took a recess for ten days. The Governor returned the bill with his veto upon the day after the House reconvened. *Held,* the adjournment, preventing the return within five days, invalidated the bill. *In re Act Concerning Public Utilities* (N. J. 1912) 84 Atl. 906.

The legislature has a right to adjourn at any time within the limit provided by the constitution, and the judiciary may not investigate its motives in so doing. See *S. & E. R. R. Co.* v. *Cooper* (1859) 33 Pa. 278, 283; *Harpending* v. *Haight* (1870) 39 Cal. 189, 202; Cooley, Const. Lim., (7th ed.) 257. If "adjournment", therefore, should be construed to denote a suspension for recess, it was rightly held that the bill did not become a law. But in two jurisdictions an adjournment has been construed to mean only an adjournment *sine die,* upon which premise it was held, in a like situation, that the legislature was still an organized body to whom the governor could have communicated his veto during the recess by a delivery of the bill to an officer of the House of origin, which was the best return possible, and that upon his failure to thus return the bill it became a law. *Soldiers' Voting Bill* (1864) 45 N. H. 607; *Harpending* v. *Haight supra.* By a third view the period of recess is dropped from computation, so that the time within which the return may be made includes only those days during which the bill can be delivered to the House while it is in actual session. *State* v. *South Norwalk* (1904) 77 Conn. 257. This seems the most reasonable construction, for it makes the return public and certain, and would prevent the House in which a bill had originated from voiding it on the eve of its becoming a law by taking a short recess, which would be the inevitable result of the extreme view taken in the principal case.

CORPORATIONS — DIRECTORS — VOIDABLE CONTRACT — RATIFICATION BY HOLDING COMPANY.—The plaintiff corporation entered into a contract with the defendant corporation. The contract was voidable because the plaintiff's directors were stockholders of the defendant. A corporation holding the majority of the plaintiff's stock, and having the same directorate, ratified the contract. *Held,* the plaintiff could avoid the contract. *Brooklyn Heights Railroad Co.* v. *Brooklyn City Railroad Co.* (N. Y. 1912) 151 App. Div. 465. See Notes, p. 56.

CORPORATIONS—STOCK SUBSCRIPTIONS—RESCISSION FOR FRAUD.—A stockholder intervened in an action against the corporation, claiming a return of the amount of his subscription, on the ground that it had been secured by the fraud of the corporation. The company was insolvent and there were creditors whose claims had arisen after the subscription contract was made; but the stockholder had acted promptly, and had not discovered the fraud until after the insolvency. *Held,* the stockholder's claim was superior to that of corporate creditors. *People* v. *California Safe Deposit & Trust Co.* (Cal. 1912) 126 Pac. 516. See Notes, p. 62.

CRIMINAL LAW—DEFENSES—PRIOR CONVICTION FOR FELONY.—A prisoner serving a life sentence was brought up on an indictment for another felony committed before his arrest. *Held,* the court could try and sentence him. *Ex parte Tranmer* (Nev. 1912) 126 Pac. 337.

A plea of *autrefois attaint* for another felony was generally a good plea at common law upon the theory that a second prosecution would be useless, since nothing could have added to the punishment of death or outlawry which attended the former attaint. 4 Bl. Comm. 336, 380; see *State* v. *Connell* (1872) 49 Mo. 282. This plea, except to a second indictment for the same crime, was early abolished by statute in England, 7 & 8 George IV., c. 28, § 4, and in this country, save in a single decision, *Crenshaw* v. *State* (Tenn. 1827) 1 Mart. & Y. 122, has never been recognized. A convict is, therefore, amenable to the criminal laws, and can be tried at once for a crime committed during his imprisonment, *Singleton* v. *State* (1894) 71 Miss. 782; *Ex parte Brunding* (1871) 47 Mo. 255, even though he may be under a life sentence; and the death penalty may be imposed and carried out at once, *Coleman* v. *State* (1896) 35 Tex. Crim. 404; see *Peri* v. *People* (1872) 65 Ill. 17, for it cannot reasonably be claimed that the prisoner, having been committed, has the right to serve out his sentence. *State* v. *Brown* (1893) 119 Mo. 527; *Thomas* v. *People* (1876) 67 N. Y. 218. The principal case, however, presents a novel situation, in that the second crime was committed before the prisoner's arrest; but this, it seems, would not distinguish it, in the absence of some bar to the prosecution occasioned by lapse of time.

CRIMINAL LAW—DOUBLE JEOPARDY—BURGLARY AND LARCENY COMMITTED IN ONE TRANSACTION.—The defendant was tried upon an indictment consisting of two counts, one of which alleged breaking and entering a post-office with intent to steal, and the second a larceny committed within. He was convicted and sentenced separately upon both counts, and after serving his sentence for the burglary sued out a writ of habeas corpus for his release from prison, claiming that the conviction for larceny violated the Constitutional protection against double jeopardy. *Held,* the petition should be granted. *Munson* v. *McClaughry* (C. C. A. Eighth Cir. 1912) 198 Fed. 72. See Notes, p. 60.

EMINENT DOMAIN—COMPENSATION—SUITABILITY OF LAND FOR USE FOR WHICH IT IS TAKEN.—An irrigation company sought to condemn a strip of land on which there was an abandoned ditch, particularly useful for its purposes. *Held,* the value of the ditch should have been considered in estimating the damages. *Roberts et al.* v. *Scurvin Ditch Co.* (Colo. 1912) 125 Pac. 552.

The general test for estimating a fair compensation for property

taken under the exercise of the power of eminent domain is the market value. 2 Lewis, Eminent Domain, (2nd ed.) § 478; *C. K. & W. R. R. Co.* v. *Parsons* (1893) 51 Kan. 408. However, no little difficulty has been encountered in determining what elements enter to make up the market value. A satisfactory valuation for property which is readily saleable is reached by considering its worth to one desiring, but under no necessity to buy, or to the owner who likewise is willing, but not compelled to sell. *Ligare* v. *Chicago etc. R. R. Co.* (1897) 166 Ill. 249; *Kansas City etc. R. R. Co.* v. *Fisher* (1892) 49 Kan. 17. But if, because of the peculiar conditions, there is no exchange value, a determination of its worth must be gained from an examination into its natural usefulness, regarding all the uses of which the land is reasonably capable. *Lowe* v. *City of Omaha* (1891) 33 Neb. 587; *Little Rock etc. R. R. Co.* v. *McGehee* (1883) 41 Ark. 202. The land's suitability for the particular use which the condemnor contemplates should be considered in the estimate, *Boom Co.* v. *Patterson* (1878) 98 U. S. 403; *Young* v. *Harrison* (1855) 17 Ga. 30, but only if there are probable buyers in an open market who desire the land for the same purposes, *Gibson* v. *City of Norwalk* (1896) 13 Oh. C. C. 428; *U. S.* v. *Seufert* (1897) 78 Fed. 520, since the theory is to give to the owner compensation for his loss and not an amount equal to the value received by the condemning company. Hence in the principal case the value of the ditch should have been taken into consideration only if it increased the market value of the land, which is improbable under the peculiar state of facts.

EQUITY—RESTRICTIVE COVENANTS—BUILDING SCHEME—PROPERTY SUBSEQUENTLY ACQUIRED BY COMMON GRANTOR.—The owner of land projected a definite building scheme, including in his project land to which he had no title. He subsequently acquired this and conveyed a portion of it to the defendant, subject to the restrictions of the general plan. *Held*, a purchaser of the land originally owned could enforce these restrictions against the defendant in equity. *Schmidt* v. *Palisade Supply Co. et al.* (N. J. 1912) 84 Atl. 807.

It is now well settled that in the case of the ordinary building scheme the purchasers may enforce the restrictive covenants *inter se* without regard to the relative time of their purchases. *De Gray* v. *Monmouth Co.* (1892) 50 N. J. Eq. 329; 12 COLUMBIA LAW REVIEW 158. And since it would be inequitable to allow the common vendor to defeat the scheme, there can be no doubt that an implied contract arises binding him to observe the restrictions himself and to sell only subject to the covenants. See *Mackenzie* v. *Childers* (1889) 43 Ch. Div. 265. The principal case presents a novel situation, aptly illustrated, however, by the analogy of an equitable assignment of an expectancy. There the assignee's rights do not depend upon the existence of a *res* to which his interest may attach, but only upon the personal obligation of the assignor to hold the property for him when it is acquired. 12 COLUMBIA LAW REVIEW 745. Similarly, a mortgage of after acquired property is effective because the mortgagor is charged with a duty to hold the property as security when the title is obtained or when the property comes into existence. *Holroyd* v. *Marshall* (1862) 10 H. L. C. 191. Here the vendor was under an obligation, in respect to all the property in the scheme, whenever acquired, to hold it, not absolutely in trust, but subject to the restrictions he had created. Finally, when the defendant took the property with notice he was

properly compelled to observe the plaintiff's right. *Lewis* v. *Gollner* (1891) 121 N. Y. 227; see Maitland, Equity, 165, 166. This result accords with the primary principle of equity, enforceable through its decree *in personam,* that the holder of a legal right shall use it conscientiously. See 12 COLUMBIA LAW REVIEW 756.

FEDERAL JURISDICTION—REMOVAL OF CAUSES—MISJOINDER OF RESIDENT DEFENDANT.—The plaintiff joined as defendants a resident and a non-resident railroad. It appeared on the face of the complaint that no cause of action was stated against the resident. *Held,* the Federal court had jurisdiction. *M'Allister* v. *Chesapeake etc. Ry. Co.* (D. C. E. D. Ky. 1912) 198 Fed. 660.

The Federal courts are reluctant to take jurisdiction when a resident has been joined as defendant with a non-resident, see *Regis* v. *United Drug Co.* (1910) 180 Fed. 201, and the latter's right to remove seems at times to have been confined to instances in which the joinder was tainted with fraud, actual or imputed. *Floyt* v. *Shenango Furnace Co.* (1911) 186 Fed. 539; see 12 COLUMBIA LAW REVIEW 359. In the absence of actual fraud, *Wecker* v. *National Enameling Co.* (1907) 204 U. S. 176, when the complaint by any reasonable construction shows that the resident was properly joined, there is no Federal jurisdiction, *Alabama Southern Ry.* v. *Thompson* (1906) 200 U. S. 206; *Southern Ry. Co.* v. *Miller* (1910) 217 U. S. 209, even though the joinder was made to oust the Federal court. *Illinois Central Co.* v. *Sheegog* (1909) 215 U. S. 308; *Chicago etc. Ry. Co.* v. *Willard* (1911) 220 U. S. 413. On the other hand, if it is clear from the plaintiff's pleadings that no cause of action exists against the resident defendant, the cause is removable. *Geer* v. *Mathieson Alkali Works* (1903) 190 U. S. 428. The sole controversy then being between the plaintiff and the only defendant against whom a cause of action is stated, the non-resident, the language of the removal statute would seem to give the Federal court jurisdiction, *Atlantic Coast Line Co.* v. *Bailey* (1907) 151 Fed. 891; *Lockhard* v. *St. Louis etc. Co.* (1909) 167 Fed. 675, and therefore the imputation of fraud is unnecessary. It is often difficult to decide whether the non-liability of the resident is a question of law which the State court must determine, or whether it appears on the face of the pleadings, but the court in the principal case took the latter view, and held that the jurisdiction so acquired was not lost by its decision that no cause of action existed against the non-resident.

JUDGMENTS—FOREIGN JUDGMENTS—CONCLUSIVENESS—RECIPROCITY.—The plaintiff sued in a Federal court to enforce a Mexican judgment properly rendered by a court of competent jurisdiction. *Held,* the judgment was conclusive upon the merits. *Cruz* v. *O'Boyle* (D. C. M. D. Pa. 1912) 197 Fed. 824.

In the absence of fraud or want of jurisdiction, the English courts now recognize the final judgment *in personam* of a foreign tribunal, when sued upon, as conclusive of the merits. *Bank of Australasia* v. *Nias* (1851) 16 Q. B. 717; *Kersall* v. *Marshall* (1856) 1 C. B. [N. S.] *241, on the theory that it imposes upon the defendant an obligation to pay the sum awarded, which may be enforced by any court acquiring personal jurisdiction. See *Rousillon* v. *Rousillon* (1880) L. R. 14 Ch. Div. 351; *Williams* v. *Jones* (1845) 13 M. & W. 628. This sound view is further supported by the desirability of putting an end to litigation. The courts of this country were generally inclined to follow

the English doctrine, *Lazier* v. *Westcott* (1862) 26 N. Y. 146; *Baker* v. *Palmer* (1876) 83 Ill. 568, until the case of *Hilton* v. *Guyot* (1895) 159 U. S. 113 established the rule that a foreign judgment rendered under a legal system not repugnant to our own, should be given only the recognition which the foreign tribunal gives to the judgment of our courts. See *Strauss* v. *Conried* (1902) 121 Fed. 199; *Fisher Brown Co.* v. *Fielding* (1895) 67 Conn. 91. This test, based on reciprocity, seems unsatisfactory from a legal standpoint, giving to a foreign judgment a weight fluctuating with every change in the attitude of the courts of that country toward our decisions. The law of Mexico likewise recognizes the rule of reciprocity in giving effect to foreign judgments. See *Hilton* v. *Guyot supra,* 226. It is submitted that as between two countries adopting this rule, the first case arising in either country should recognize the other's judgment as a conclusive exposition of its law.

JUDGMENTS—MERGER OF ONE JUDGMENT IN ANOTHER.—To an action of debt in California upon a Massachusetts judgment, the defendant pleaded that this judgment had been merged in a judgment rendered upon it in Washington. *Held,* there had been no merger. *Lilly-Brackett Co.* v. *Sonneman* (Cal. 1912) 126 Pac. 483. See Notes, p. 69.

LABOR UNIONS—STRIKES—RIGHT TO STRIKE FOR CLOSED SHOP.—The defendants instituted a strike for the purpose of forcing their employer to discharge the plaintiffs, who refused to join the defendants' union. *Held,* three judges dissenting, the plaintiffs could obtain no relief. *Kemp et al.* v. *Division 241* (Ill. 1912) 99 N. E. 389. See Notes, p. 66.

LANDLORD AND TENANT—ABANDONMENT—DUTY TO RE-LET.—In an action for rent due on a lease abandoned by the tenant, the latter pleaded in mitigation that the landlord made no attempt to re-let the premises. *Held,* one judge dissenting, the plea was bad. *National Exchange Bank* v. *Hahn* (Okla. 1912) 126 Pac. 554.

It is familiar law that a servant who has been wrongfully discharged by his master is under a duty to minimize his damages as far as reasonably possible. 1 Sedgwick, Damages, (9th ed.) § 206. Upon this apparent analogy, see *Winant* v. *Hines* (N. Y. 1887) 14 Daly 187, it has been held that a corresponding duty exists where a tenant abandons his lease. *Resser* v. *Corwin* (1897) 72 Ill. App. 625; see *Greene* v. *Waggoner* (N. Y. 1859) 2 Hilt. 297. In the former class of cases, however, the repudiation of the contract by the employer has the effect of terminating the relation of master and servant, *Champion* v. *Hartshorne* (1833) 9 Conn. 564, leaving the latter the sole remedy of suing for breach of contract, with the accompanying duty to seek other employment. *Howard* v. *Daly* (1875) 61 N. Y. 362. So also where a charter party has been repudiated by the charterer his interest, which existed merely by virtue of contract, revests in the owner, who has a like remedy subject to a like duty. *Dunn* v. *Allen* (N. Y. 1901) 59 App. Div. 561; see *Johnson* v. *Meeker* (1884) 96 N. Y. 93. A tenant, on the other hand, acquires by a lease an actual estate independent of contract, 1 Tiffany, Land. & Ten. § 16, of which he cannot divest himself by mere abandonment; *Shannon* v. *Burr* (N. Y. 1856) 1 Hilt. 39; *Brown* v. *Kite* (Tenn. 1814) 2 Overt. 233; hence his landlord retains the right to sue on the covenant for the full arrears of rent. It would seem that a more appropriate analogy might be drawn from cases where a vendee under an executed contract of sale repudiates the transaction,

and is nevertheless held liable for the contract price. *Hunter* v. *Wetsell* (1881) 84 N. Y. 549. The principal case, therefore, in accordance with the general rule, rightly held that the doctrine of avoidable consequences was inapplicable. 3 Sutherland, Damages, (3rd ed.) § 844.

LIBEL AND SLANDER—NEWSPAPER CRITICISM—FAIR COMMENT.—In an action of libel for a criticism of the plaintiff's book, the defendant pleaded fair comment. *Held,* the defense changed the action from one of strict libel to one in the nature of an action on the case for injuries resulting from unfair comment, and therefore no special damage need be proved. *Post Publishing Co.* v. *Peck* (C. C. D. Mass. 1912) 199 Fed. 6.

The right of free speech carries with it the right to discuss matters of public interest, and the press may, therefore, comment fairly on literary productions presented to the public. *Carr* v. *Hood* (1808) 1 Camp. 355-*n; McQuire* v. *Western Morning News Co.* L. R. [1903] 2 K. B. 100; *Dowling* v. *Livingstone* (1896) 108 Mich. 321. It has been held that fair comment is privileged defamation, the privilege consisting in the right to hold up to ridicule and contempt, for the public's benefit, such literary works as, in the critic's opinion, merit the treatment. *Henwood* v. *Harrison* (1872) 7 C. P. 606; *Ross* v. *Ward* (1901) 14 S. D. 240; see 23 Law Q. Rev. 97. The better view, however, regards fair comment as a matter of common right, Burdick, Torts, (2nd ed.) 331; Pollock, Torts, (8th ed.) 257 *et seq.,* and adverse criticism as never libelous if it remains within the bounds of fair comment and attacks only the writings and not the character of the author. *Campbell* v. *Spottiswoode* (1863) 3 B. & S. 769; *Merivale* v. *Carson* (1887) 20 Q. B. D. 275. The defense of privilege, therefore, differs from that of fair comment in that the former is a justification of defamatory words which, but for the privilege, would be actionable, *McCarty* v. *Lambley* (N. Y. 1897) 20 App. Div. 264, while the latter defense, which is set up in the principal case, is a denial of libel, as nothing is libelous and at the same time fair comment. Accordingly this plea in no way changes the cause of action, which remains one of strict libel.

NEGLIGENCE—LAST CLEAR CHANCE—INJURY TO GOODS.—The plaintiff's cotton, negligently stored on a compress platform, was destroyed by fire caused by sparks from the defendant's locomotive. The engineer, having discovered the danger, could have averted the injury by using another track. *Held,* one judge dissenting, the defendant was liable. *Furst-Edwards Co.* v. *St. Louis S. W. Ry. Co.* (Tex. 1912) 146 S. W. 1024.

The principle that one who has been negligent and suffers damage may nevertheless recover if the defendant had a clear chance to prevent the injury by the exercise of ordinary care, *Harrington* v. *Los Angeles Ry. Co.* (1903) 140 Cal. 514; *B. & O. Ry. Co.* v. *Hellenthal* (1898) 88 Fed. 116; *contra, C. B. & Q. Ry. Co.* v. *Lilley* (Neb. 1903) 93 N. W. 1012, has found its most frequent expression in suits against railroads for personal injuries to trespassers, where the defendant was engaged in the use of a highly dangerous instrument, and the principle is, indeed, sometimes based on purely humanitarian considerations. *St. Louis R. R. Co.* v. *Jacobson* (1902) 28 Tex. Civ. App. 150; *Hanlon* v. *Mo. Pac. Ry. Co.* (1891) 104 Mo. 381, 389. While this ground, if sound, might also justify recovery for injuries to beasts, see *Davies* v. *Mann*

(1842) 10 M. & W. 545, it evidently can have no application where inanimate property alone is concerned. But since the prevailing theory is that the defendant's negligence is a breach of his new duty to avoid the injury after discovering the peril, and therefore supersedes the plaintiff's negligence as a proximate or decisive cause, *Indianapolis St. Ry. Co.* v. *Schmidt* (1904) 35 Ind. App. 202; 12 COLUMBIA LAW REVIEW 729, it seems, as was held in the principal case, that there is no reason for not allowing recovery for injuries to property as well as to persons in the same situation. *Edwards* v. *Bonner* (1896) 12 Tex. Civ. App. 236; but see *Martin* v. *T. & P. Ry. Co.* (1894) 87 Tex. 117.

NEGLIGENCE—PROXIMATE CAUSE—ATTEMPTED RESCUE.—The plaintiff left a position of safety and attempted to rescue one who had been placed in a perilous situation through the defendant's negligence. In the explosion that followed the plaintiff was injured. *Held,* he was not guilty of negligence *per se*. *Perpich* v. *Leetonia Mining Co.* (Minn. 1912) 137 N. W. 12.

The law does not impute contributory negligence to one who endangers himself in an attempt to save the life of a person imperilled by the negligence of another, unless such acts would be deemed reckless by an ordinarily prudent person in the same circumstances; *Eckert* v. *L. I. Ry. Co.* (1871) 43 N. Y. 502; *Corbin* v. *Philadelphia* (1900) 195 Pa. St. 461; and where the emergency is sudden, with little time for deliberation, the same accuracy of judgment is not exacted as would be required under other circumstances. *P. R. R.* v. *Langendorf* (1891) 48 Oh. St. 316; *Cottrill* v. *C. M. & St. P. Ry. Co.* (1879) 47 Wis. 634. Some courts, however, in their refusal to grant a recovery hold that the defendant's negligence is not the proximate cause of the plaintiff's injury; *Anderson* v. *Northern R. W. Co.* (Can. 1875) 25 U. C. C. P. 301, 318, 319; see *E. & C. R. Co.* v. *Hiatt* (1861) 17 Ind. 102, but while it is true that the immediate cause of the plaintiff's injury is his own act, yet such act is instinctive and is therefore the natural and probable consequence of the defendant's negligence. *Gibney* v. *State* (1893) 137 N. Y. 1; *Maryland Steel Co.* v. *Marney* (1898) 88 Md. 482; 8 COLUMBIA LAW REVIEW 667. Thus the plaintiff's right to recover is based upon strict legal principle and is not merely given in recognition of his meritorious conduct. See dissenting opinion in *Corbin* v. *Philadelphia supra.*

OFFICERS—ELIGIBILITY OF JUDGE FOR OTHER OFFICE.—A judge was nominated for governor. His term as judge would expire after the election but before the induction to the new office, provided his sucessor duly qualified. *Held,* a constitutional provision that judges shall be ineligible to any other office was ground for prohibiting the certification of his nomination. *State ex. rel. Reynolds* v. *Howell* (Wash. 1912) 126 Pac. 954.

In construing the term "eligible" the courts have not felt bound by its derivative meaning, "capable of being chosen," but have sought the purpose of the law in considerations of expediency. When the object is merely to insure the fitness of candidates to hold office, as by requiring the attainment of a certain age, see *Smith* v. *Moore* (1893) 90 Ind. 294, 303, it seems enough if the person is qualified when the term begins, though it is doubtful whether this construction is justified when the qualification, and therefore the validity of the election, would depend upon a contingency, as when it is required that a person of

foreign birth be naturalized. *Taylor* v. *Sullivan* (1891) 45 Minn. 309; *contra, Kirkpatrick* v. *Brownfield* (1895) 97 Ky. 558. But the provision in the principal case was not made to insure the fitness of candidates, but to secure an unbroken term as judge, and the court, in construing this as preventing a judge's candidacy for a new office, took at least a reasonable position. *Demaree* v. *Scates* (1893) 50 Kan. 275; *cf. Searcy* v. *Grow* (1860) 15 Cal. 118; but see *Smith* v. *Moore supra.* Moreover, even if the resulting inconvenience to judicial officers would outweigh the desirability of keeping them out of politics, yet in the principal case the fact that the incumbent's term would continue until his successor qualified, rendered his capacity to take the new office contingent, and made him, as the court held, ineligible. See *Vogel* v. *State* (1886) 107 Ind. 374; dissenting opinion in *Demaree* v. *Scates supra.*

PATENTS—ESTOPPEL OF LICENSEE—EXPRESS ACKNOWLEDGMENT OF PATENT'S VALIDITY.—A patented article was sold subject to the license restriction, of which the licensee had full notice, that the patent was acknowledged to be valid in all its claims. The licensor sued for infringement in selling a competing article. *Held,* the licensee was not estopped to deny the validity of the patent. *Lovell-M'Connel Mfg. Co.* v. *Waite Auto Supply Co.* (D. C. D. R. I. 1912) 198 Fed. 130.

A licensee reaping the benefits from the sale of a patented article under a license will be estopped, even in the absence of express agreement, to deny his licensor's title or the validity of the patent, when sued as licensee. Bigelow, Estoppel, (3rd ed.) 433; *Crossley* v. *Dixon* (1863) 10 H. L. C. 293; *Kinsman* v. *Parkhurst* (1855) 18 How. 289. To escape the obligations imposed by the license conditions, the licensee must have clearly repudiated the license, thus subjecting himself to suit as infringer in selling the patented article. *Brown* v. *Lapham* (1886) 27 Fed. 77; *Skinner* v. *Wood* (1893) 140 N. Y. 217. Hence an express acknowledgment of the validity of the patent, incorporated in the license, would be meaningless unless it were extended to work an estoppel in any suit by a licensor against a licensee who is at the time enjoying the benefits conferred by the license, even though the cause of action is not against the licensee as such, but as an infringer in selling competing articles, as in the principal case. *Dunham* v. *Bent* (1885) 72 Fed. 60. It has been held that such an agreement would be void, if so extended, on grounds of public policy, where it presents the possibility of repression of competition by a really invalid patent. *Pope Mfg. Co.* v. *Gormully* (1891) 144 U. S. 224. But it seems that there would be no great injury either to the public or to the individual in enforcing such an agreement or estoppel, when fully understood, against one who is still enjoying the advantages of the license, when there is no evidence of unjust or unreasonable restraint of trade. *Phila. Creamery Co.* v. *Davis etc. Co.* (1896) 77 Fed. 879; *Consolidated Co.* v. *Finley Co.* (1902) 116 Fed. 629.

SALES—FRAUDULENT REPRESENTATIONS—MEASURE OF DAMAGES.—The plaintiff paid $25,000 for stock, worth somewhat more, but fraudulently represented to be worth $100,000. *Held,* in an action of deceit, he could recover the difference between the actual value and the value as represented. *Chapman* v. *Bible et al.* (Mich. 1912) 137 N. W. 533.

A defrauded vendee who does not elect to repudiate his contract may sue either for breach of warranty or in an action on the case for

deceit. 2 Sedgwick, Damages, (9th ed.) § 780. If he sues on the warranty, it is well settled that the measure of damages is the difference between the actual value and the value as represented, *Cary* v. *Gruman* (N. Y. 1843) 4 Hill 625, since the action is in contract, and the warranty a promise that the goods are as represented. *Muller* v. *Eno* (1856) 14 N. Y. 597. If, however, an action on the case for deceit is brought, the authorities are in sharp conflict upon the question of damages. The majority of the State courts apply the same rule as in an action for breach of warranty. *Murray* v. *Jennings* (1875) 42 Conn. 9; *Spreckels* v. *Gorrill* (1907) 152 Cal. 383; *Still* v. *White* (1846) 52 Mass. 356. On the other hand, in England, *Peek* v. *Derry* (1887) 37 Ch. Div. 541, and in the Federal courts, *Smith* v. *Bolles* (1889) 132 U. S. 125; *Pittsburg L. & T. Co.* v. *Insurance Co.* (1905) 140 Fed. 888; *Rockefeller* v. *Merritt* (1896) 76 Fed. 909, and in some States, *Buschman* v. *Codd* (1879) 52 Md. 202; *High* v. *Berret* (1892) 148 Pa. 261; *Reynolds* v. *Franklin* (1890) 44 Minn. 30, the true tort character of the action of deceit is observed, *George* v. *Hesse* (1906) 100 Tex. 44, and the vendee is allowed to recover only his actual loss, which is usually the difference between the real value and the purchase price, but may include other probable consequences of the fraud. *Nashua Bank* v. *Electric Co.* (1900) 100 Fed. 673; *Sigafus* v. *Porter* (1900) 179 U. S. 116. It would seem to be to the vendee's interest that these forms of action, with their different measures of damages, should be kept distinct, see *Smith* v. *Duffy* (1895) 57 N. J. L. 679, as there are conceivable cases in which the actual loss exceeds the difference between the actual value and the value as represented, in which event the proper measure of damages in deceit would be to his advantage.

SUBROGATION—RIGHT OF VOLUNTEER AGAINST INTERVENING INCUMBRANCERS.—The plaintiff, with no interest to protect, at the request of the mortgagor discharged a mortgage due to a third person and took a new mortgage, in ignorance of the fact that the defendant had acquired a judgment lien on the property. *Held,* since the plaintiff was a volunteer, he was not entitled to be subrogated to the rights under the first mortgage for the purpose of obtainng priority over the defendant. *Nelson* v. *McKee* (Ind. 1912) 99 N. E. 447. See Notes, p. 58.

SURETYSHIP AND GUARANTY—DISCHARGE OF SURETY—AMENDED COMPLAINT.—After obtaining a bond to dissolve his attachment, the plaintiff amended his complaint so as to claim increased damages, without however, changing his cause of action, and received a judgment in excess of the penal sum of the bond. *Held,* the surety was not discharged. *Commonwealth* v. *A. B. Baxter & Co.* (Pa. 1912) 84 Atl. 136.

An increase in the plaintiff's claim for damages has been held to discharge the surety on the ground that it increases his liability and thus varies his contract. *Langley* v. *Adams* (1855) 40 Me. 125; *Ruggles* v. *Berry* (1884) 76 Me. 262; see *Matthews* v. *Armstrong* (Tenn. 1833) 4 Yerg. 181. This may be true where the amendment so changes the cause of action that the judgment is rendered in a different action from the one in which the bond was given, *Prince* v. *Clark* (1879) 127 Mass. 599; *Kyer* v. *Smith* (1829) 3 Cranch C. C. 437, but if the amendment has not that effect, a mere increase in the *ad damnum* can hardly be held to increase the liability assumed by the contract. For where, as in the principal case, the King's Bench practice, see *Martin* v. *Moor* (1732) 2 Stra. 922, is adopted, and the bond is construed as a contract

to pay only the sum originally claimed, it is evident that there is no increased liability. *Taylor* v. *Wilkinson* (1835) 5 Nev. & Man. 189; *De Egana* v. *Jackson* (1850) 5 La. Ann. 430. And even under the more usual bond contracting to pay whatever damages may be rendered in the action up to the penal sum, see *Simmons* v. *Kelly* (1877) 39 N. J. L. 438, the position is taken that the parties must have contemplated the possibility of the plaintiff's making such amendments as the law allows. *Hare* v. *Marsh* (1884) 61 Wis. 435; see *Matoon* v. *Eder* (1856) 6 Cal. 58. Therefore, so long as the cause of action remains the same, it would seem that any "increased liability" is only what the surety has contracted for, and should not discharge him. *Townsend Bank* v. *Jones* (1890) 151 Mass. 454; *Carr* v. *Sterling* (1889) 114 N. Y. 558; see *New-Haven Bank* v. *Miles* (1825) 5 Conn. 587.

TENANCY IN COMMON—LIABILITY OF CO-TENANT FOR USE AND OCCUPATION.—A co-tenant of a mine improved an existing tunnel and used it to work his own adjoining property. *Held,* he must compensate the other co-tenant, even though there was no interference with her use of the tunnel. *Morton* v. *Laesch* (Colo. 1912) 125 Pac. 498.

A tenant in common, seized *per my et per tout,* has a legal right to use the whole of the common estate, *Mumford* v. *Brown* (N. Y. 1828) 1 Wend. 52, and therefore his co-tenant formerly had a remedy only when he was actually ousted of possession or when the other had agreed to act as his bailiff. Co. Litt. 199-*b,* 172-*a; Pico* v. *Columbet* (1859) 12 Cal. 414. Following the English Statute, 4 & 5 Anne, c. 16, an action of account can now generally be maintained against a co-tenant who has received more than his share of rents and profits, irrespective of agreement, *Wheeler* v. *Horne* (1740) Willes 208; *Gage* v. *Gage* (1890) 66 N. H. 282; but see *Ayotte* v. *Nadeau* (1905) 32 Mont. 498, 511, upon the theory that the law makes the co-tenant a bailiff without express appointment. *Hayden* v. *Merrill* (1872) 44 Vt. 336. It is, however, generally admitted that the non-occupying tenant cannot recover rent when his co-tenant, though freely using the property, does nothing to exclude him. *Sargent* v. *Parsons* (1815) 12 Mass. 149; *Ragan* v. *McCoy* (1860) 29 Mo. 356; *Hamby* v. *Wall* (1886) 48 Ark. 135. In the principal case the user by the defendant, while of great convenience to him in working his adjoining claim, involved no restriction upon a similar user by his co-tenant. For this reason it might be argued that the situation is distinguishable from that in an earlier case in the same jurisdiction, *People ex rel. Breen* v. *Dist. Court* (1900) 27 Colo. 465, where the co-tenant was excluded from the use of a similar tunnel, and a recovery was allowed, for it seems that a co-tenant should have the same right to use the common property for the purpose of passing to and from his own neighboring land, as for any other purpose.

UNFAIR COMPETITION—SUIT BY FOREIGN CORPORATION TO ENJOIN INCORPORATION UNDER SIMILAR NAME.—An Illinois corporation, engaged in business in Kansas by license, sought to restrain the defendants from incorporating in that State under a name resembling its own. *Held,* the injunction should be granted. *Modern Woodmen of America* v. *Hatfield* (D. C. D. Kan. 1912) 199 Fed. 270.

Though admitting the soundness of the general rule that a domestic corporation may restrain the use of its name upon the ground of unfair

competition, *Holmes* v. *Holmes* (1870) 37 Conn. 278, the defendant in the principal case contended that a foreign corporation, doing business by license, and subject to exclusion, cannot question the right of a domestic corporation in its name, upon the theory that the name is conferred by the State. This proposition, if not squarely held, has been entertained in several cases, *Lehigh Valley Coal Co.* v. *Hamblen* (1885) 23 Fed. 225; *Hazleton Boiler Co. v. Hazleton Tripod Boiler Co.* (1892) 142 Ill. 494; *Continental Ins. Co.* v. *Continental Fire Ass'n.* (1900) 101 Fed. 255, but the accurate view seems to be that the name is the choice of the incorporators, which the State merely sanctions; and it is inconceivable that the State intended to aid in misleading the public and in perpetrating a wrong. *Philadelphia Trust etc. Co.* v. *Philadelphia Trust Co.* (1903) 123 Fed. 534, 541; *Peck Bros. & Co.* v. *Peck Bros. Co.* (1902) 113 Fed. 291. However, it may be argued, the view that the State confers the name would itself afford a ground for the decision in the principal case. For where the corporate name, as here, discharges the functions of a trade name, in that it conveys to the public mind the unique quality of the services or commodities of the corporation and distinguishes them from those of competitors, see 6 COLUMBIA LAW REVIEW 252; *Hall* v. *Barrows* (1863) 4 DeG., J. & S. 149, it is, upon the same principles, see *Newby* v. *Ore. C. R. Co.* (1869) Deady 609, a property right in the corporation. *Hainque* v. *Cyclops Iron Works* (1902) 136 Cal. 351; *Glen & Hall Mfg. Co.* v. *Hall* (1874) 61 N. Y. 226. It would follow that the act of Kansas in conferring upon one of its own corporations the name of an Illinois corporation, with authority to engage in the same business as the latter, would deprive the foreign corporation of its property without due process of law; see 6 COLUMBIA LAW REVIEW *supra*, 258; nor is this inconsistent with the recent case of *Vassar College* v. *Loose-Wiles Biscuit Co.* (1912) 197 Fed. 982, which held that the abstract name of a corporation, apart from any question of unfair competition, is not a property right. But see 12 COLUMBIA LAW REVIEW 693, 696-*n;* 745.

WILLS—ELECTION—DEVISE OF COMMUNITY PROPERTY.—The testator devised all his property to trustees, to pay over the net income to his wife during her widowhood. *Held,* the wife was not called upon to elect between the net income and her statutory half of the community property, but could take both. *Herrick* v. *Miller* (Wash. 1912) 125 Pac. 974.

When a testator attempts to dispose of the property of another, to whom he devises some of his own property as if in compensation, the devisee must elect to relinquish the devise, or to surrender his own property according to the direction of the testator; he cannot accept the benefits conferred by the will and at the same time refuse to recognize the obligations which it imposes. *Matter of Hayden* (N. Y. 1889) 1 Connolly 454; *Hibbs* v. *Insurance Co.* (1884) 40 Oh. St. 543. It must, however, clearly appear upon the face of the will that it was the testator's intention to dispose of property belonging to the devisee, and not to himself, *Jones* v. *Jones* (Md. 1849) 8 Gill 197; *Sherman* v. *Lewis* (1890) 44 Minn. 107; *Penn* v. *Guggenheimer* (1882) 76 Va. 839, 846, and when he is the owner of only a part interest in a piece of property, his use of general language with reference to that property will be construed to refer only to his own interest therein. *Pratt* v. *Douglas* (1884) 38 N. J. Eq. 516; *Leonard* v. *Steele* (N. Y. 1848) 4 Barb. 20.

A testator's devise to his wife, moreover, is presumed to be in addition to and not in lieu of her dower or statutory interest, unless they are clearly inconsistent or a contrary intention is expressed in the will, *Church* v. *Bull* (N. Y. 1845) 2 Denio 430; *In re Gilmore* (1889) 81 Cal. 240; *Malter of Franke* (1896) 97 Ia. 704, although there is a contrary statutory rule in many States. See *Warren* v. *Warren* (1893) 148 Ill. 641; *Griggs* v. *Veghte* (1890) 47 N. J. Eq. 179; *Schorr* v. *Etling* (1894) 124 Mo. 42. Since it does not appear in the principal case that the testator intended to dispose of his wife's community interest, or that the provision for her was intended to be in lieu of her interest, it was properly held that she was not put to her election.